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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR S. PEREZ,

Defendant and Appellant.

B204195

(Los Angeles County  
Super. Ct. No. VA086267)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey Lawes Falcone. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Victor S. Perez appeals from the judgment entered following a court trial in which he was convicted of two counts of committing a forcible lewd act on a child under 14 years of age. (Pen. Code, § 288, subd. (a).)<sup>1</sup> He was sentenced, pursuant to section 667.6, subdivision (c), to a term of 14 years in prison (the upper term of eight years on count 3 and the middle term of six years on count 4). He contends on appeal that the trial court erred by admitting statements made by the victim to her mother as a fresh complaint, and failing to state reasons for its sentencing choice. Acknowledging that trial counsel may have forfeited his sentencing claim by failing to object, he argues that he received ineffective assistance of counsel. We affirm the conviction.

### **FACTUAL AND PROCEDURAL BACKGROUND**

L. is appellant's niece. On November 29, 2004, when she was six years old, she was with her brother and sister at appellant's house in South Gate playing with appellant's daughter. While the other children were in the house, appellant called L. into the backyard, told her to take off her pants and to lie down on what she called a "donkey," which was apparently a wooden sawhorse. Appellant took out a blue and white tube of cream. He put some cream on his finger and told L. he was putting medicine on her because she had fallen in the bathtub, but L. had not hurt herself in the bathtub that day. L. felt something inserted in her anus. She told appellant to stop and he told her to stop moving. She started crying and he spanked her. She felt something poking her and appellant told her not to look at him. He then said "good girl" and told her to get ready to go home. L. went into the house and lay on the bed with the other children who were watching television. That evening, she told her mother that it hurt when she tried to go to the bathroom and that appellant had put "Balmex" on her. Her mother and appellant's wife drove her to the hospital where she was examined. L. had

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All further statutory references are to the Penal Code.

previously been to the doctor and treated for vaginal irritation and discharge caused by a urinary tract infection. However, at the time of the assault, she had no such infection.

The emergency room physician who examined L. saw a rash but did not note any obvious trauma. He spoke with South Gate Police Officer Jim Teeple, who took L. to County USC Hospital for a sexual assault examination. L. told Officer Teeple that her uncle stuck his finger in her vagina and rubbed some cream on it and put an unknown object in her anal area. Toni Zaragoza, a nurse practitioner at the hospital, examined L. in the early morning hours of November 30. L. told Zaragoza that appellant removed her clothing, put her on the “horsey,” and told her he was going to clean her. He put some cream on the front, then he flipped her over and put it on her buttocks. Zaragoza took samples from her leg and thigh. She observed cream in the vaginal area and around the anus. The tissue in her anus was enlarged and puckered but there was no blood or tearing. The findings were consistent with chronic sexual assault. Swabs of secretions taken from L.’s leg and her shirt had semen on them, which was tested for DNA. Appellant was determined to be a possible contributor of the semen. L.’s vaginal and anal area did not have any semen.

Detective Rodney Bishop spoke to L. on November 30, around noon. L. told him that appellant was “cleaning” her while she lay on the sawhorse. Appellant had gotten angry at her when she tried to look at him and spanked her on the buttocks. Later, he gave her a dollar and told her she was a good girl.

Detective Bishop later searched appellant’s home and recovered a blue and white tube of K.Y. Jelly containing spermicide and another tan and white tube of A and D ointment.

At trial, appellant testified he was very involved in L.’s life and had offered to take care of her that day. He heard a noise from the bathroom and saw L. climbing out of the tub. He thought she had hurt herself. He wanted to make sure nothing was wrong with her. He had her remove her overalls and took off her underwear to make sure she wasn’t hurt. He has a daughter and had changed her and applied medicine to her many times. He saw redness on L. and went inside to get ointment. L. didn’t want to stay there on the

sawhorse, so he was stern with her. He had no intent to sexually arouse himself. He later checked on her and applied more ointment. He said that afternoon he had sex with his wife, and assumed that L. got the semen on her when she was lying on the bed.

Dr. Theodore Hariton testified on appellant's behalf. He had examined all the medical reports, the police report, and the video of Zaragoza's exam. He concluded there was no medical evidence that appellant penetrated L.'s anus or vagina. However, on cross-examination he admitted he could not exclude sexual abuse as the cause of her condition.

Dr. Ronald Fairbanks, a psychologist who examined appellant and conducted numerous tests, concluded that there was nothing to suggest appellant was a sexual offender.

## **DISCUSSION**

### **I. Fresh Complaint**

Appellant unsuccessfully sought to have portions of L.'s mother's testimony excluded prior to trial on the grounds that it did not constitute a fresh complaint.

The testimony was as follows: "[THE PROSECUTOR:] Once [L.] went to the bathroom, what happened next? [¶] [L.'S MOTHER:] She came up to me saying that she couldn't pee and I asked . . . [¶] [DEFENSE COUNSEL:] For the record, [there is] going to be [a] continuing hearsay objection. I've addressed my grounds. I don't think this is a fresh complaint. [¶] THE COURT: Thank you. Objection overruled. . . . [¶] [L.'S MOTHER:] Then she came saying she couldn't pee because it burned. I'm like, why does it burn. Uncle Victor put Balmex on me and I asked her . . . . And I asked her why he [would] do that. She said he said he wanted to check me if I was clean. [¶] [THE PROSECUTOR:] Did she — do you remember if she specifically used the word 'Balmex'? [¶] [L.'S MOTHER:] Yes. [¶] [THE PROSECUTOR:] What is Balmex? [¶] [L.'S MOTHER:] Balmex is a cream for rashes like when they have a rash when they peed and that's the Balmex. Put it on them or usually I give it to her to put on

herself. [¶] [THE PROSECUTOR:] Did she tell you that he did anything else other than just put the Balmex on her? [¶] [L.'S MOTHER:] She said that his [*sic*] uncle put it around her and a little bit of the tip of his finger — she called it a black hole — it went a little bit in.”

Appellant contends that the court erred in allowing the testimony because the statement L. made was not a complaint but a statement of fact, and included unnecessary details which should have been excluded as hearsay.

Assuming, without finding, that the court should have excluded the evidence, any conceivable error was utterly harmless. When the trial court abuses its discretion in admitting a hearsay statement, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statement been excluded. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526.) L. consistently gave the same version of events to Officer Teeple, Zaragoza, the nurse practitioner, Detective Bishop, and during her testimony at trial. Moreover, appellant admitted he put ointment on L. and his semen was found on L.'s body and clothing. On this record, appellant was not prejudiced by any perceived error.

## **II. Sentencing**

Appellant contends that the trial court's comments indicate that it was not aware it had the discretion to impose less than a full-term consecutive sentence. He argues the matter must be remanded for a new sentencing hearing.

Section 1170.1 provides that if the court imposes consecutive terms, the longest term for an offense becomes the principal term. Consecutive sentences for any other offenses (subordinate offenses) are limited to one-third of the middle term.<sup>2</sup>

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<sup>2</sup> That section provides that: “(a) Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior

Section 667.6, subdivision (c)<sup>3</sup> allows the court the option of imposing separate, full, consecutive terms for certain sex offenses, but the court must state its reasons for imposing consecutive sentences, and also for its decision not to utilize the section 1170.1 sentencing scheme. (*People v. Belmontes* (1983) 34 Cal.3d 335, 346-348.) Appellant alleges the trial court failed to do so in the present case.

However, appellant concedes that his counsel failed to object to the manner in which sentence was imposed. He acknowledges that the Supreme Court has held that an appellant cannot complain for the first time on appeal that the trial court failed to state its reasons for making a discretionary sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Anticipating that we will determine that he failed to preserve his claim of sentencing error for appeal, he asserts he received ineffective assistance of counsel. As we conclude that appellant has forfeited the right to challenge his sentence, we examine whether trial counsel was ineffective.

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convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

<sup>3</sup> The subdivision provides as follows: “(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.”

An appellant claiming that he or she received ineffective assistance of counsel “must show that counsel’s representation fell below an objective standard of reasonableness” (*Strickland v. Washington* (1984) 466 U.S. 668, 688), and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.)

We need not address whether counsel’s performance was deficient, as we are satisfied that there is no reasonable probability that his alleged error affected the outcome. Appellant suggests that if his attorney had lodged the appropriate objection, he might have received a lesser sentence. We disagree.

Appellant does not dispute that the trial court was aware that in imposing a consecutive sentence it could have selected one of three terms pursuant to section 667.6, subdivision (c), the low term of three years, the midterm of six years, and the upper term of eight years. Nor does appellant take issue with the court’s selection of the upper term of eight years for count 3. As we have noted, the court chose the middle term of six years for count 4 and ordered that it be served consecutively to count 3. If the court had sentenced appellant pursuant to section 1170.1, the maximum sentence it could have imposed would have been 10 years (the upper term of eight years for count 3 and one-third of the middle term of six years (two years) for count 4). The court knew that it could have sentenced appellant to a term of 11 years (the upper term of eight years on count 3 and the low term of three years on count 4); however, for reasons stated on the record, it rejected that choice and sentenced him to the greater term of 14 years. Given that fact, even if counsel had informed the court that it could have sentenced appellant pursuant to section 1170.1, it is not reasonably probable that it would have chosen that scheme to sentence him to 10 years when it knowingly declined to sentence him to 11. Accordingly, appellant cannot demonstrate he was prejudiced by counsel’s performance.

**DISPOSITION**

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.